**EMPAYAR CANGGIH SDN BHD**

**v.**

**KETUA PENGARAH BAHAGIAN PENGUATKUASA KEMENTERIAN PERDAGANGAN DALAM NEGERI DAN HAL EHWAL PENGGUNA MALAYSIA & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[JUDICIALLY REVIEW NO: R3(1)-25-302-2006]
9 MARCH 2010

***ADMINISTRATIVE LAW:*** *Exercise of judicial functions - Judicial Review - Exercise of investigative function by public decision-maker - Allegation of unlawful seizure of machinery under Optical Discs Act 2000 - Whether courts should interfere - Whether jurisdictional error, error of law or manifest unreasonableness within statutory context proven*

***ADMINISTRATIVE LAW:*** *Exercise of judicial functions - Judicial Review - Merits of decision, inquiry into - Whether High Court exercises appellate function during judicial review - Whether High Court can inquire into merits of decision*

***ADMINISTRATIVE LAW:*** *Judicial review - Remedies - Damages - Whether damages ought to be claimed under civil action and not judicial review - Claim for damages for breach of provisions of Optical Discs Act 2000 - Provision contained in Act for claiming damages through civil action - Whether damages can nevertheless be claimed during judicial review*

***WORDS AND PHRASES:*** *"reasonable cause" - Optical Discs Act 2000, s. 48 - Whether equated with honest belief*

This application for judicial review was filed originally for the relief of *certiorari* and *mandamus*, and damages in respect of an alleged unlawful seizure of machinery from the applicant's factory. The applicant was in the business of manufacturing video compact discs. The *certiorari* prayed for was to quash the decision of the 2nd respondent who decided not to release the seized machinery and items. The *mandamus* was to compel the 2nd respondent to return the said items. Special damages were claimed for loss of use of the machinery, loss of revenue, repairs costs to the factory and repair

costs of the seized machineries. However since the respondent had agreed to return the machinery before the leave application was heard, the application was then amended to limit the reliefs to damages and a declaration that the seizure of the machines was without reasonable cause and as such wrong in law.

**Held (dismissing the application for judicial review with costs):**

**(1)** The seizure was done under powers conferred by the Optical Discs Act 2000 ('the Act'). The reference to "reasonable cause" appears expressly in s. 48 of the Act. Reasonable and probable cause is equated with honest belief. (paras 5 & 6)

**(2)** Judicial review is not appellate jurisdiction. It is not concerned with the merits of a decision but with the manner in which the decision is made, but merits can be inquired into where the reasonableness or rationality of the decision is challenged. (para 9)

**(3)** The applicant had procured new machines and moved to new factory premises without obtaining the requisite approvals from the respondents. Further, the raid was conducted on information received from reasonable sources, namely the Motion Picture's Association and International Federation Phonograph Industries. On the totality of the evidence, it could not be reasonably surmised the respondents had not taken into account relevant factors or taken into account irrelevant factors, or had acted based on manifest unreasonableness. (paras 12-14)

**(4)** The exercise of statutory power being challenged concerned an investigative function. Public policy will require that courts should be slow to interfere unless there has been some jurisdictional error, error of law or manifest unreasonableness within the statutory context. (para 15)

**(5)** The statutory context in s. 48 indicates that the proper remedy where a claim for damages is made is through a civil action, not judicial review *per se*. At any rate, such a claim for damages, if brought as part of a judicial review application, should be established as maintainable as an ordinary action if an ordinary action is brought. A claim for damages in a judicial review application cannot be grounded merely on the basis that there has been an infringement of the principles of administrative law. (paras 15 & 19)

**(6)** In the context of the Act, s. 48 limits the claim for damages where a seizure is made "without reasonable cause." Since there was reasonable cause in the exercise of an investigative function, a claim for damages therefore could not succeed. (para 19)

**Case(s) referred to:**
*Herniman v. Smith [1938] 1 All ER 2* ***(refd)***
*Hicks v. Faulkner [1881] 8 QBD 167* ***(refd)***
*Holiday Villages of Malaysia Sdn Bhd v. Menteri Sumber Manusia & Anor [2010] 7 CLJ 683 CA* ***(refd)***
*Waz Lian Enterprise Sdn Bhd lwn. Kerajaan Malaysia & 1 Lagi [1994] 4 CLJ 979 HC* ***(refd)***

**Legislation referred to:**
Optical Discs Act 2000, ss. 48, 52
Rules of the High Court 1980, O. 53 r. 2(3)

*For the applicant - Gabriel Daniel (Lim Sook Yee with him); M/s Paul Ong & Assoc*
*For the respondent - Shamsul Bolhassan (Haryati & Nizam Zakaria) AG's Chambers*

*Reported by Amutha Suppayah*

## JUDGMENT

**Mohamad Ariff Yusof J:**

**[1]** This present application for judicial review was filed originally for the relief of *certiorari* and *mandamus*, and damages in respect of an alleged unlawful seizure of machinery from the applicant's factory. The applicant was at the material time in the business of manufacturing video compact discs. The *certiorari* prayed for was to quash the decision of the 2nd respondent who decided not to release the seized machinery and items. The *mandamus* was to compel the 2nd respondent to release and return the said items and machinery within seven days from the date of the order, in good functional condition. There was also a declaration prayed that the decision of the 2nd respondent not to released the seized items was wrong in law and therefore null and void. Special damages were claimed for:

A (a) RM3,888,000 for loss of use of an offset printing machine seized for the period of 2 March 2006 to September 2006 and future damages thereafter from October until date of order;

(b) RM14,688,000 for loss of revenue from March 2006 to
B September 2006, and further sums from October 2006 until date of order, or such amount as may be assessed by this court from March 2006 until date of order; and

(c) special damages of RM185,999 as repairs costs to the factory or such damages as may be assessed by this court; and
C

(d) damages for repair costs to the seized machineries once these are released and an expert engineer has assessed and given a quotation.

D **[2]** Enclosure I was amended with leave of this court on 10 August 2009. Under the amended application for judicial review, the reliefs are limited to a declaration and damages to be assessed. Even the prayer for declaratory relief has now become a declaration that the seizure of the machines, equipment and goods of the
E application, and the damage caused to them, was the result of a seizure that was carried out without reasonable cause and as such wrong in law.

**[3]** The amendment became necessary because the factual matrix
F had changed; the 2nd respondent had agreed to return the machines and equipment before the application for leave was heard. According to the respondent's version of the facts, the applicant was informed by letter of this decision on 22 February 2007 before the hearing for leave held on 30 April 2008. The applicant on the other hand
G denied receiving this letter, counsel contending that they did not know of this until the date of hearing of the leave application. It is the applicant's contention that even if the remedies of *certiorari* and *mandamus* are no longer available, the court can still order monetary compensation under O. 53 r. 2(3).

H **[4]** The focus has then shifted to an award of damages under O. 53 r. 2(3), and a determination whether the seizure was done with reasonable cause.

**[5]** The seizure itself was done under powers conferred by the
I Optical Discs Act 2000 (Act 606), to be precise under Part VII of the Act dealing with powers of enforcement.

**[6]** The reference to "reasonable cause" appears expressly in s. 48 of the Act: A

> No person shall, in any proceedings before any court in respect of any article, optical disc, thing, book or document seized in the exercise or the purported exercise of any power conferred under this Act, be entitled to the costs of such proceedings or to any damages or other relief unless such seizure was made without reasonable cause. B

**[7]** Whether or not there was "reasonable cause" to seize the machines and equipment is a question of fact, not law. To this C extent, I agree with the statement of principle stated in *Waz Lian Enterprise Sdn. Bhd. lwn. Kerajaan Malaysia & 1 Lagi* [1994] 4 CLJ 979 and its reference and approval of the statement stated in *Herniman v. Smith* [1938] 1 All ER 2 and *Hicks v. Faulkner* [1881] 8 QBD 167; reasonable and probable cause is equated with D honest belief. Such a view is in line with s. 52 of the Act which imposes a bar on the institution of an action or prosecution against the Controller, Deputy Controller, Assistant controller or any officer authorised or any person for any act done by him under order, direction or instruction of the Controller, Deputy E Controller, Assistant controller etc., if the act was done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served thereby.

**[8]** These two provisions in the Act appear to extend beyond judicial review. However, It remains necessary to decide whether F an action such as the present can be instituted within the framework of judicial review.

**[9]** The parameters of judicial review jurisdiction has been re-affirmed recently by the Court of Appeal in *Holiday Villages of* G *Malaysia Sdn Bhd v. Menteri Sumber Manusia & Anor* [2010] 7 CLJ 683, where it has been reiterated that judicial review is not appellate jurisdiction. It is not concerned with the merits of a decision but with the manner in which the decision is made, but merits can be inquired into where the reasonableness or rationality H of the decision is challenged. However "unreasonableness" or "irrationality" in administrative law is a more limited concept than what is ordinarily understood. At one narrow extreme, it means in the sense of "Wednesbury unreasonableness", normally a decision which is so outrageous or in defiance of logic that it cannot be allowed to I

A stand. A less rigid formula, also accepted in the cases, is whether the decision challenged is one which a reasonable decision maker similarly circumstanced would have made.

**[10]** On the facts of this present application, the applicant has to
B establish not only unreasonable conduct but conduct which is manifestly unreasonable according to the standards of administrative law. It can also been analysed this way: has the authority or decision maker exercised his or its power absurdly or reached an absurd result.

C

**[11]** The evidence establish that the seized machinery and equipment were located in a new factory at SD 11, Jalan KIP, Taman Perindustrian KIP, Kepong instead of the approved factory at No. 200, Jalan 1, Taman Perindustrian Ehsan Jaya, Kepong. At
D the time of the raid on 2 March 2006 the applicant had yet to obtain from the respondent the approval to move its operation to this new factory. Secondly, although approval was given to upgrade the existing machinery (the "Krauses Massei KM 80-190 CD 94") for the purpose of manufacturing DVDs, this approval did not cover the new machines. The machines which were seized
E were different machines: "Staeg Hamatech" and "Anwell DVD Smartline." It was argued for the respondents that this itself was in breach of the Optical Disc Regulations 2000 which required a Source Identification Code (SID Code) for each approved and specified machine. The applicant used the same SID Code for the
F new machines. Further to that, the Staeg Hamatech Machine was under bond in a 2003 criminal application in Johor Bahru where ownership of the machine was in a different company, Cantik Holdings.

G **[12]** The facts therefore disclosed the applicant had procured the new machines and moved to new factory premises without obtaining the requisite approvals from the respondents.

**[13]** The raid was also conducted on information received from
H reasonable sources, namely the Motion Picture's Association and International Federation Phonograph Industries.

**[14]** On the totality of the evidence, I do not believe it can be reasonably surmised the respondents had not taken into account
I relevant factors or taken into account irrelevant factors, or had acted based on manifest unreasonableness. As stated by Syahrul Hisyam b Abd. Karim, the Penolong Pengawal Cakera Optik, in his affidavit:

> 8. Pasukan saya yang terdiri daripada pegawai-pegawai Unit Risikan telah mendapat maklumat daripada pihak pengadu, Mohamed Zamzam dari Motion Picture's Association dan seorang pegawai Penguatkuasaan, David Matherson dari International Federation Phonograph Industries.

**[15]** Mention has also to be made that the exercise of statutory power being challenged concerns an investigative function. Public policy will require that courts should be show to interfere unless there has been some jurisdictional error, error of law or manifest unreasonableness within the statutory context. Further, the statutory context, as exemplified by s. 48, appears to indicate that the proper remedy where a claim for damages is made is thorough a civil action, not judicial review *per se*. Otherwise, for every investigation that does not lead to a prosecution, a claim for damages can be brought on some perceived error of law or failure to take into account relevant consideration. At any rate, such a claim for damages, if brought as part of a judicial review application, should be established as maintainable as an ordinary action if an ordinary action is brought. It is necessary at this juncture to mark out the principles and rules in this connection.

**[16]** "Damages are available on judicial review only where there is a right to damages in private law." Gordon, *Judicial Review and Crown Office Practice* (1999):

> This result is ensured by the phraseology of O. 53 r. 7(1)(b) … which provides that before damages can be awarded the court must be satisfied that:
>
> > if the claim had been made in an action begun by the Applicant at the time of making his application, he could have been awarded damages.
> >
> > The Applicant must include the claim in his Statement in Support of the application for leave … In view, however, of the court's wide powers of amendment … the omission of a claim for damages would not appear to be fatal provided that such right existed at the time the application was made.
> >
> > Where damages are sought they must be pleaded with the same particularity in an ordinary action … The inclusion of such a remedy on judicial review is a concession to procedural convenience. Nonetheless the following consequences ought to follow from the fact of a private law remedy being available in public law proceedings:

A (a) If the Applicant fails to persuade the court that he has a remedy in public law he should not be awarded damages. This is implicit in the requirement that damages cannot be claimed unless subordinate to a claim for one or more of the principal orders available …

B (b) Even if a right to damages is made out the court, in judicial review proceedings, presumably has a discretion to refuse the order …

(c) Since, *ex hypothesis*, the remedy lies for infringement of a private law right it cannot be an abuse of process to C initiate a claim for damages by action rather than proceeding under O. 53 …

(d) Interest on the amount of damages should be capable of being recovered …

D (at para 3.366-3.368, pp. 203-204).

**[17]** See also Clive Lewis, *Judicial Remedies in Public Law* (4th edn.):

E Such claim can only be made in addition to a claim for the prerogative remedies … a claim for damages cannot be made in isolation. Damages may only be awarded if they could have been awarded in an ordinary claim; that is, only if there was a right to damages at private law … No new remedy or right to damages is introduced by the rules. The rules simply provide, as a matter F of convenience, that claim for private law damages … may be included in a claim for judicial review …

**[18]** See also Michael Supperstare and James Goudie, *Judicial Review* (1997):

G The new RSC Ord. 53 is a reform concerned with remedies and with public law, not extending, or diminishing, substantive rights in private law. It creates no new cause of action. It enables a claim for damages for breach of a private law duty resulting from unlawful conduct by a public authority to be joined with a public H law application to establish the unlawfulness rather than being claimable only in an action begun by writ. That is of value because it avoids the instigation of duplicate proceedings.

**[19]** It then appears that a claim for damages in a judicial review application cannot be grounded only on the basis that there has I been merely an infringement of the principles of administrative law. The applicant has to proceed further and establish that he has a

right to damages at private law if initiated in an ordinary action. In the context of the Optical Discs Act, as we have seen, s. 48 limits the claim for damages where a seizure is made "without reasonable cause." A claim for damages, on the facts of this application, and on the basis of my earlier finding that there was reasonable cause in exercise of an investigative function, cannot therefore succeed.

**[20]** Application for judicial review dismissed with costs to be taxed, unless agreed.